

February 07, 2014

EDWARD J. EMMONS, ACTING CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: February 7, 2014

Dennis Montali

DENNIS MONTALI

U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
HOWREY LLP,) No. 11-31376DM
Debtor.) Chapter 11
ALLAN B. DIAMOND, Chapter 11) Adversary Proceeding
Trustee for Howrey LLP,) No. 13-3056DM
Plaintiff,)
v.)
HAYNES AND BOONE LLP,)
Defendant.)

MEMORANDUM DECISION ON MOTIONS TO DISMISS

I. INTRODUCTION

Plaintiff Allan B. Diamond, Chapter 11 Trustee ("Trustee") for debtor Howrey LLP ("Debtor"), filed multiple nearly identical complaints for avoidance and recovery of actual and constructive fraudulent transfers and for an accounting and turnover and other relief, seeking to recover from several law firm defendants the value of profits received by them with respect to unfinished business that previously had been handled by Debtor. Trustee contends that a prepetition waiver of Debtor's interest in profits

1 realized or to be realized from its unfinished business ("Howrey
2 Unfinished Business") constituted a fraudulent transfer. On
3 October 23, 2013, the court held a hearing on motions to dismiss
4 (collectively, the "motions") filed by nine of these defendants.¹
5 Having considered the motions, the oppositions and the arguments
6 of the parties, the court will grant the motions in part and deny
7 them in part, although Trustee will be given leave to amend the
8 complaints in some respects.²

9 As this court has previously held when applying California
10 law, the unfinished business of a law partnership is any business
11 covered by retainer agreements between the firm and its clients
12 for the performance of partnership services that existed at the
13 time of dissolution. *Greenspan v. Orrick Herrington & Sutcliffe*
14 (*In re Brobeck, Phelger & Harrison LLP*), 408 B.R. 318, 333 (Bankr.
15 N.D. Cal. 2009) ("*Brobeck*"), citing *Rosenfeld, Meyer & Susman v.*
16 *Cohen*, 146 Cal. App. 3d 200, 217, 194 Cal. Rptr. 180 (1983). It
17 does not, however, extend to business created after dissolution,
18 even if that business comes from a client of the dissolved firm.

19
20 ¹ By the time of the hearing three defendants had settled,
21 leaving for argument and decision motions in the following six
22 adversary proceedings: 13-3056 (Haynes & Boone LLP); 13-3057
(Neal, Gerber & Eisenberg LLP); 13-3060 (Kasowitz Benson Torres &
23 Friedman LLP); 13-3093 (Jones Day LLP); 13-3094 (Hogan Lovells
24 US); and 13-3095 (Pillsbury Winthrop Shaw Pittman LLP).

25 Three defendants initially filed separate motions to dismiss,
26 then joined with three others in a joint motion to dismiss. Three
27 other defendants filed separate motions to dismiss. The six
28 adversary proceedings have not been consolidated. This Memorandum
Decision is being filed in each of the six adversary proceedings,
with changes only in the caption. Orders disposing of the motions
will be separately filed in each of those six actions.

² While some defendants argued issues that others did not,
the court deals with all issues as though they had been raised in
all motions by all defendants.

1 *Brobeck*, 408 B.R. at 333. The entitlement of partners to recover
2 profits from a dissolved law firm's unfinished business (the
3 "Unfinished Business Rule") is well-established under California
4 law. *Id.*, citing *Jewel v. Boxer*, 156 Cal. App. 3d 171, 203 Cal.
5 Rptr. 13 (1994) ("*Jewel*"). Here, Debtor's partnership was
6 governed by the laws of the District of Columbia ("D.C."), and
7 thus this court must apply D.C.'s law. For the reasons set forth
8 below, the court concludes that D.C. law pertaining to the
9 Unfinished Business Rule is similar to that of California.

10 II. ISSUES

11 **A. Does the Unfinished Business Rule apply to Hourly Rate**
12 **Matters in the District of Columbia?**

13 **B. May the Trustee recover under the fraudulent transfer laws**
14 **profits on Howrey Unfinished Business that was handled by former**
15 **partners of Debtor who left Debtor prior to its dissolution?**

16 **C. May the Trustee recover under the fraudulent transfer**
17 **laws profits on Howrey Unfinished Business that was acquired from**
18 **former partners of Debtor who left as of or after its dissolution?**

19 **D. May the Trustee recover profits on Howrey Unfinished**
20 **Business by an Accounting and Turnover count under 11 U.S.C. §**
21 **542?**

22 **E. May the Trustee amend the complaints to proceed against**
23 **defendants with respect to Howrey Unfinished Business that was**
24 **handled by former partners of Debtor who left Debtor prior to its**
25 **dissolution?**

26 III. FACTS³

27 Debtor, then known as Howrey Simon Arnold & White, LLP,
28 adopted a partnership agreement in 2000. Although originally
formed as a general partnership, Debtor thereafter operated as a
limited liability partnership under the D.C. Uniform Partnership

³ For purposes of motion to dismiss the court treats all
relevant facts in the Trustee's complaints as true.

1 Act of 1996, as amended ("D.C. RUPA").⁴

2 By early 2010, Debtor was insolvent or inadequately
3 capitalized. On March 4, 2011, Debtor's management scheduled a
4 vote for dissolution and five days later Debtor's partners voted
5 to dissolve under D.C. RUPA, effective March 15, 2011. Also on
6 March 4, 2011, management informed the partners about a proposed
7 amendment to Debtor's partnership agreement to be executed
8 concurrently with dissolution. Debtor's partners were urged to
9 execute a Jewel Waiver, absent which they would have had a duty to
10 account to Debtor for profits earned on the Howrey Unfinished
11 Business.⁵

12 The actual Jewel Waiver adopted by Debtor and its partners on
13 March 9, 2011, is found in Amendment No. 3 to Debtor's Partnership
14 Agreement that added a new paragraph 19.3. That paragraph
15 provides, in part:

16 19.3 No Unfinished Business Following Dissolution. In
17 the event of dissolution of the Partnership (as set
18 forth in Paragraph 17.3 above), neither the Partners nor
19 the Partnership shall have any claim or entitlement to
clients, cases or matters ongoing at the time of
dissolution other than the entitlement for collections
of amounts due for work performed by the Partners and

20 ⁴ D.C. RUPA was amended in July, 2011, and again in 2013,
21 {effective March 5, 2013) to redesignate section numbers; there
22 were no substantive changes. Since events relevant to the issues
23 before the court occurred before that date, the prior section
numbers will be used in this Memorandum Decision.

24 ⁵ As this court has described in *Brobeck* and multiple *Heller*
25 decisions, a Jewel Waiver releases the claims of a dissolving
26 partnership and its partners to profits arising from unfinished
27 business. *Brobeck*, 408 B.R. at 327; see also *Heller Ehrman LLP v.*
28 *Arnold & Porter LLP (In re Heller Ehrman LLP)*, 2011 WL 1539796
(Bankr. N.D. Cal. Apr. 22, 2011) ("*Heller I*"); *Heller Ehrman LLP*
v. Jones Day (In re Heller Ehrman LLP), 2013 WL 951706 (Bankr.
N.D. Cal. Mar. 11, 2013) ("*Heller II*"); and *Heller Ehrman LLP v.*
Jones Day (In re Heller Ehrman LLP), 2014 WL 323068 (Bankr. N.D.
Cal. Jan. 28, 2014) ("*Heller III*").

1 other Partnership personnel on behalf of the Partnership
2 prior to the earlier of their respective departure dates
3 from the Partnership or the date of dissolution of the
4 Partnership. The provisions of this Paragraph 19.3 are
5 intended to expressly waive, opt out of and be in lieu
6 of any rights any Partner or the Partnership may have to
7 'unfinished business' of the Partnership, as that term
8 is defined in *Jewel v Boxer*, 156 Cal. App. 3d 171 (Cal.
9 Dist. Ct. App. 1984), or as otherwise might be provided
10 in the absence of this provision through interpretation
11 or application of the LLP Act.

12 Some partners of Debtor left before March 4, 2011, and joined
13 five of the six defendants presently before the court; more left
14 after dissolution and joined the sixth defendant and two of the
15 other five.⁶

16 The complaints do not allege specifics regarding the matters
17 of Howrey Unfinished Business defendants completed, nor profits
18 they realized on that Howrey Unfinished Business. Thus, the
19 principal questions presented by the present motions are
20 (1) whether under D.C. law, the Unfinished Business Rule applies
21 to hourly rate work, and (2) whether defendants can be held liable
22 as subsequent transferees under 11 U.S.C. § 550 based upon Howrey
23 Unfinished Business acquired from partners of Debtor who left
24 prior to the Jewel Waiver. As set forth below, the court believes

25 ⁶ The strategy of the Trustee in this law firm bankruptcy is
26 somewhat different from that of the trustee in *Brobeck* and the
27 liquidating debtor in *Heller*. In those cases, the fraudulent
28 transfer actions were predicated on the fact that members of those
firms left as of dissolution, which occurred on or after the date
of the respective Jewel Waiver. Here, though, Trustee is seeking
recovery of profits on business brought to some of the defendants
prior to adoption of the Jewel Waiver. This court has determined
that the Jewel Waivers in *Brobeck* and *Heller* were fraudulent
transfers. *Brobeck*, 408 B.R. at 338-341; *Heller II*, 2013 WL
951706; and *Heller III*, 2014 WL 323068. Whether or not the Jewel
Waiver in this case was a fraudulent transfer depends upon the
application of D.C. law, discussed *infra*. Whether defendants can
be held liable under the fraudulent transfer laws on account of
Howrey Unfinished Business they acquired prior to dissolution is a
matter of first impression for this court.

1 that the Unfinished Business Rule does apply to hourly rate
2 matters. With respect to the second issue, defendants contend
3 that, as to matters transferred after the date of dissolution,
4 they were not initial or subsequent transferees of Debtor's
5 property and that Debtor's estate has no interest in the profits
6 earned on Howrey Unfinished Business. The court has already
7 addressed those issues in *Brobeck*, *Heller I* and *Heller II*.
8 *Brobeck*, 408 B.R. at 338-341; *Heller I*, 2011 WL 1539796; *Heller*
9 *II*, 2013 WL 951706; and *Heller III*, 2014 WL 323068. The result
10 here is the same.

11 IV. DISCUSSION

12 **A. The Unfinished Business Rule Applies to Hourly Rate**
13 **Matters in the District of Columbia.**

14 1. D.C. Law

15 In deciding defendants' motions, this court must follow
16 "state law as announced by the highest court of the [s]tate."
17 *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967); accord
18 *Vacation Vill., Inc. v. Clark County, Nev.*, 497 F.3d 902, 915 (9th
19 Cir. 2007). This court cannot certify matters to the District of
20 Columbia Court of Appeals, even when a party (defendants here)
21 contends that the governing law is unsettled.⁷ That being the
22 case, this court's duty is to apply the law as it finds it. Here,

23 ⁷ The District of Columbia Court of Appeals may answer
24 questions of law certified to it by the Supreme Court of the
25 United States, a court of appeals of the United States, or the
26 highest appellate court of any state, if there are involved in any
27 proceeding before any such certifying court questions of D.C. law
which may be determinative of the cause pending in such certifying
court and as to which it appears to the certifying court there is
no controlling precedent in the decisions of the District of
Columbia Court of Appeals. D.C. Code § 11-723(a).

28

1 with the District of Columbia Court of Appeals having issued two
2 significant decisions, and the United States District Court for
3 the District of Columbia having issued another, this court's task
4 is straightforward and the result is settled, notwithstanding
5 defendants' argument to the contrary. Further, sound policies
6 support the result: the Unfinished Business Rule applies to hourly
7 rate matters in D.C.

8 Defendants argue that the Unfinished Business Rule applies in
9 D.C. only as to contingency fee matters. Trustee, quite
10 obviously, relies on the trilogy of D.C. cases that support
11 application of the Unfinished Business Rule to matters handled on
12 an hourly basis. Those cases, read together, are decisive. See
13 *Beckman v. Farmer*, 579 A.2d 618 (App. D.C. 1990), *Young v.*
14 *Delaney*, 647 A.2d 784 (App. D.C. 1994), and *Robinson v. Nussbaum*,
15 11 F. Supp. 2d 1 (D.D.C. 1997).

16 While *Beckman* involved contingency fees, the court was
17 unequivocal in its statement that the fiduciary obligations of
18 partners runs throughout the liquidation to the conclusion of the
19 winding up, and applies to "any transaction connected with the
20 conduct, or liquidation of the partnership. . . ." *Beckman*, 579
21 A.2d at 636. Despite defendants' desire that the court read
22 *Beckman* narrowly, that court's direction is clear that "all work
23 performed on partnership business unfinished at the date of
24 dissolution ... was done for the benefit of the dissolved
25 partnership." *Id.* at 639 (emphasis added). Citing *Jewel* (among
26
27
28

1 other state court cases),⁸ the *Beckman* court observed that
2 "pending cases are uncompleted transactions requiring winding up .
3 . . and are therefore assets of the partnership subject to post-
4 dissolution distribution." *Id.* at 636. "It follows that any
5 profits from the completion of such unfinished business inure to
6 the partnership's benefit, even if received after dissolution."
7 *Id.*

8 The *Beckman* court also rejected the argument that application
9 of the Unfinished Business Rule would impair lawyer mobility:

10 The duty to wind up partnership business does not
11 disable the former partners in a law firm from accepting
12 employment from former clients of the dissolved
13 partnership, provided the new employment does not relate
14 to work in progress at the time of dissolution.

15 579 A.2d at 638.

16 Finally, the *Beckman* court held that the Unfinished Business
17 Rule "is a creature of statute and attempts by courts to evade it
18 are inappropriate," especially where partners could have "entered
19 a partnership agreement which could have assured" the doctrine did
20 not apply unless the firm and its partners so desired. *Id.* at 640
21 (citing *Jewel*, 156 Cal. App. 3d at 180).

22 Four years after deciding *Beckman*, the District of Columbia
23 Court of Appeals again held that the Unfinished Business Rule
24 applies to law firms. *Young v. Delaney*, 647 A.2d at 784. Holding

25 ⁸ For example, *Beckman* relied on five other state court
26 decisions affirming the Unfinished Business Rule. See *Ellerby v.*
27 *Speizer*, 485 N.E.2d 413 (Ill. App. Ct. 1985); *Rosenfeld, Meyer &*
Susman v. Cohen, 146 Cal. App. 3d 200 (1983); *Resnick v. Kaplan*,
434 A.2d 582 (Md. 1981); *In re Mondale & Johnson*, 437 P.2d 636
(Mont. 1968); and *Frates v. Nichols*, 167 So. 2d 77 (Fla. Dist. Ct.
App. 1964).

28

1 that a fact issue (whether partners had entered into a
2 profit-sharing agreement) should have precluded the trial court's
3 summary judgment, the court held that "[p]ending cases are
4 uncompleted transactions requiring winding up after dissolution,
5 and are therefore assets of the partnership subject to
6 post-dissolution distribution.'" *Id.* at 792, quoting *Beckman*, 579
7 A.2d at 636. "Profits derived from the completion of legal cases
8 or uncompleted transactions after dissolution of a law
9 partnership are assets of the partnership, subject to distribution
10 after dissolution. Under the Uniform Partnership Act, these fees
11 are shared on dissolution in accordance with the rights of the
12 partners in fees in the former partnership." *Young v. Delaney*,
13 647 A.2d at 789.

14 The D.C. federal district court has likewise adopted the
15 reasoning of *Beckman*. In *Robinson v. Nussbaum*, 11 F. Supp. 2d at
16 5-6, one partner of a dissolved law firm filed a counterclaim
17 against his former partners' new law firm, seeking a share of
18 "hourly fees earned by [the new firm] which stem from client
19 matters which were pending but uncompleted at the time of
20 dissolution." *Id.* at 5. The district court granted summary
21 judgment in his favor, holding:

22 The Partnership Act, as interpreted in *Beckman*, requires
23 that former partners share all profits earned from
24 completing client matters that were pending at the time
25 of dissolution. As explained below, how the firm's
26 clients were billed - either at an hourly rate or on a
27 contingency fee basis - does not change the status of
28 their work as partnership property.

26 *Id.* (emphasis in original).

27 The counter-defendants in *Robinson* argued that "being forced
28 to share their profits with a former partner who is no longer

1 contributing his time or expertise to the case" violated
2 principles of fairness. *Id.* at 6. While the court acknowledged
3 that applying the Unfinished Business Rule to hourly matters would
4 "appear unfair," it concluded these concerns did not warrant
5 confining the rule to contingent fee cases because (1) partners
6 "are free (indeed encouraged)" to resolve unfinished business
7 disputes through written partnership agreements; (2) the
8 Unfinished Business Rule does not apply to new matters brought
9 into the new firm after dissolution of the old firm; and (3) if
10 applied to all former partners, the rule is equitable. *Id.* at 6.

11 2. Persuasive Analyses by Other Courts

12 This court is also impressed by the policy arguments that the
13 District Court in New York applied to a similar question of
14 whether hourly fee matters are subject to the Unfinished Business
15 Rule in New York. The analytic steps taken by the court there are
16 a perfect proxy for analyzing D.C. law here. In *Development*
17 *Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (In re*
18 *Coudert Brothers LLP)*, 480 B.R. 145 (S.D.N.Y. 2012), ("Coudert"),
19 *leave to appeal granted*, 2012 WL 10234967 (2d Cir. Dec. 18, 2012),
20 *and questions certified to New York Court of Appeals*, Case No. 12-
21 4916 (Dkt. 144) (2d. Cir. Jan. 24, 2014), the district court
22 comprehensively analyzed whether legal business billed by the hour
23 should be treated differently from contingent fee business, and
24 thus be exempt from the Unfinished Business Rule.⁹

25
26 ⁹ But see *Geron v. Robinson & Cole LLP v. Seyfarth Shaw LLP*
27 (*In re Thelen LLP*), 476 B.R. 732 (S.D.N.Y. 2012) (holding that
28 under New York law, the Unfinished Business Rule does not apply to
a dissolving law firm's pending hourly fee matters and that a
partnership does not retain any property interest in outstanding
hourly matters upon the firm's dissolution). Following appeal,

1 First, the court noted that under New York case law,
2 executory contracts (i.e., agreements to provide legal services)
3 involving contingency fee cases are law firm partnership assets.
4 480 B.R. at 163, also citing *Jewel, Beckman* and other cases. It
5 then observed that other jurisdictions treated hourly fee matters
6 as unfinished business. *Id.*, citing *Official Comm. of Unsecured*
7 *Creds v. Ashdale (In re Labrum & Doak, LLP)*, 227 B.R. 391 (Bankr.
8 E.D. Pa. 1998), *Rothman v. Dolin*, 20 Cal. App. 4th 755, 24 Cal.
9 Rptr. 2d 571 (1993), as well as *Jewel* and *Brobeck*.

10 In that context, the court stated another overriding
11 principle:

12 The fact that New York courts must harmonize their
13 rulings with those of other UPA jurisdictions by
14 statute, Partnership Law § 4(4), is powerful reason to
15 conclude that the New York Court of Appeals would reach
16 the same result.

17 *Coudert*, 480 B.R. at 164.

18 The court rejected the argument that hourly rate matters are
19 a series of "mini-contracts," each corresponding to a new billing

20 the Court of Appeals for the Second Circuit certified two
21 questions to the New York Court of Appeals:

22 [1] Under New York law, is a client matter that is
23 billed on an hourly basis the property of a law firm,
24 such that, upon dissolution and in related bankruptcy
25 proceedings, the law firm is entitled to the profit
26 earned on such matters as the "unfinished business" of
27 the firm?

28 [2] If so, how does New York law define a "client
matter" for purposes of the unfinished business doctrine
and what proportion of the profit derived from an
ongoing hourly matter may the new law firm retain?

Geron v. Seyfarth Shaw LLP (In re Thelen LLP), 736 F.3d 213 (2d
Cir. 2013). The Court of Appeals of New York accepted both
certified questions. *Geron v. Seyfarth Shaw LLP (In re Thelen*
LLP), --- N.E.2d ----, 2013 WL 6499301 (N.Y. Dec 12, 2013).

1 period. In other words, defendants there contended that
2 unfinished business effectively becomes finished each time a bill
3 is sent to the client. The *Coudert* court disagreed, noting that
4 the defendants' approach conflated a law firm's rights against its
5 clients and the rights of former partners among themselves. Thus,

6 [t]he unfinished business doctrine does not exist to
7 assure that a law firm is paid for the value of work it
8 has performed prior to dissolution. It exists to settle
9 accounts among partners upon dissolution of their
10 business. The fact that the client agreed to make
11 payments for services rendered by giving his lawyer
12 percentage of any winnings realized as opposed to paying
13 him by the hour does not alter the fundamental
14 proposition, codified in Partnership Law § 43, that
15 every partner must account to former partners for
16 profits realized from the use of what was, on the date
17 of dissolution, a partnership asset.

18 *Id.* at 166.

19 The *Coudert* court also rejected the defendants' argument that
20 application of the Unfinished Business Rule impacts negatively on
21 the clients' choice of attorney, citing many of the cases upon
22 which the District of Columbia Court of Appeals relied in *Beckman*
23 (as discussed in footnote 8, above). *Id.* at 168, citing *Jewel*,
24 156 Cal. App. 3d at 178; *Resnick*, 434 A.2d at 582; and *Ellerby*,
25 485 N.E.2d at 413. It also acknowledged (but rejected) contrary
26 authority in *Welman v. Parker*, 328 S.W.3d 451 (Mo. App. S.D.
27 2010). As discussed more fully in the next section, this court
28 agrees.

3. D.C. Ethical Rules Do Not Prohibit These Actions by the Trustee

29 Arguing that ethical and professional rules and opinions
30 preclude the Trustee's claims, defendants point to the final
31 sentence of Paragraph 19.3 of the Partnership Agreement, which
32 says that the terms of that paragraph shall be deemed modified to

1 the extent required by any applicable ethical or professional
2 disciplinary rule. Thus, they argue, the Jewel Waiver in the
3 beginning of that paragraph is voided because it violates D.C.
4 rules that govern lawyers in that jurisdiction. As a preliminary
5 matter it is hard to imagine how skilled attorneys at Debtor would
6 agree in the first part of a paragraph to do something they
7 honestly believed was rendered void by laws incorporated in the
8 last sentence of the same paragraph. Nevertheless, the court will
9 analyze whether such an apparent anomaly could possibly be the
10 case.

11 Defendants attempt to avoid application of *Beckman, Young,*
12 and *Robinson v. Nussbaum*, discussed *supra*, by arguing that the
13 Unfinished Business Rule violates the D.C. Rules of Professional
14 Conduct ("RPC") and certain D.C. ethics opinions. This court has
15 already addressed and rejected similar arguments regarding the
16 California Rules of Professional Conduct. *Heller I*, 2011 WL
17 1539796 at *5; *Heller II*, 2013 WL 951706 at *5. In addition, the
18 Opinions of the D.C. Bar Legal Ethics Committee are not binding
19 and are simply advisory. See, e.g., *In re Kagan*, 351 F.3d 1157,
20 1164 n.7 (D.C. Cir. 2003) (acknowledging that "[o]pinions of the
21 D.C. Bar Legal Ethics Committee" are "not binding on any court").
22 Even if they were binding, the ethics opinions cited by defendants
23 do not apply to the circumstances of this case, as discussed
24 *infra*.

25 Defendants first argue that the RPCs trump RUPA. In
26 particular, they contend that the Unfinished Business Rule runs
27 afoul of ethical rules requiring attorneys to be competent,
28 diligent, and zealous. Defendants' cited cases do not involve the

1 application of the Unfinished Business Rule, however. Rather, most
2 involve acts by attorneys that could be considered malpractice.
3 In *In re Bernstein*, 707 A.2d 371, 376-77 (D.C. 1998), an attorney
4 neglected a client's matters because of personal circumstances,
5 but the Trustee has not alleged that any former Debtor matters
6 were neglected. In *In re Porter*, 628 S.E.2d 888 (S.C. 2006), a
7 title attorney admitted to commingling escrowed funds with his
8 operating account, but blamed the oversight on the death of a key
9 employee and admitted he did not properly supervise his staff.
10 *Maupin v. Dep't of Energy*, No. 03-1156(PLF), 2005 WL 3211883
11 (D.D.C. Nov. 18, 2005), and *In re Violet*, 460 F. App'x 30 (2d Cir.
12 2012), involved attorneys who repeatedly missed deadlines in their
13 clients' matters. Finally, in *Missan v. Schoenfeld*, 445 N.Y.S.2d
14 856 (N.Y. Sup. Ct. 1981), the court dismissed one partner's breach
15 of contract claim that his former partners did not use their best
16 efforts to ensure firm clients succeeded to him as the former
17 partners retired. The complaints here allege no facts analogous
18 to any of these cases.

19 Defendants also contend that application of the Unfinished
20 Business Rule would violate D.C.'s RPCs governing fee sharing
21 agreements. The duty to account for profits on unfinished
22 business (a duty flowing between partners and their firm) and a
23 lawyer's fee sharing obligations (the duty to inform a client if
24 sharing fees with another firm) are distinct and do not offend
25 each other. *Heller I*, 2011 WL 1539796 at *5. Defendants have
26 offered no contrary D.C. authority suggesting that the Unfinished
27 Business Rule violates D.C.'s fee splitting rule, RPC 1.5(e).

28

1 Courts applying ethics rules similar to RPC 1.5(e) have
2 concluded that remitting profits from unfinished business does not
3 constitute impermissible fee splitting or sharing. *Labrum & Doak*,
4 227 B.R. at 413-14; (applying Pennsylvania law); *Surfin v. Hosier*,
5 896 F. Supp. 766, 769 (N.D. Ill. 1995) (applying Illinois law and
6 finding fee-splitting argument to be "unpersuasive"); *Hurwitz v.*
7 *Padden*, 581 N.W.2d 359, 363 (Minn. App. 1998) (applying Minnesota
8 law); *Ellerby*, 485 N.E.2d at 416 (concluding it was "perfectly
9 proper" for fees to be split among law partners). In *Labrum*, the
10 bankruptcy court held:

11 [T]he former clients of the Debtor were free to be
12 represented by any member of the dissolved partnership
13 or by other attorneys of their choice. This right [of
14 the former client] is *distinct from* and *does not*
15 *conflict* with the rights and duties of the partners
16 between themselves with respect to profits from
17 unfinished partnership business since, once the fee is
18 paid to an attorney, it is of no concern to the client
19 how the fee is distributed among the attorney and his
20 or her partners.

21 *Labrum*, 227 B.R. at 414 (emphasis supplied) (citing *Sufrin*, 896 F.
22 Supp. at 769).

23 Moreover, this court has twice rejected defendants' fee
24 splitting argument in the specific context of a fraudulent
25 transfer case. See *Heller II*, 2013 WL 951706, at *5 (concluding
26 "that there is not impermissible fee sharing if a bankruptcy
27 estate recovers profits earned on unfinished business by a
28 fraudulent transfer defendant") (citing *Heller I*, 2011 WL 1539796,
at *5).

Defendants cite two D.C. decisions that did not involve law
firm dissolution and the Unfinished Business Rule. Both decisions
involved a client's dispute with a lawyer, seeking either the

1 refund of an up-front fee (before a case begins) or payment on a
2 contingency fee (when a case is over) or the breach of a
3 contingency fee agreement. *In re Robert W. Mance III*, 980 A.2d
4 1196, 1202 (D.C. 2009) (flat fee for legal services not yet
5 performed remains client property); *King & King Chartered v.*
6 *Harbert, Intern., Inc.* 436 F. Supp. 2d 3, 12 (D. D.C. 2006) (a law
7 firm cannot sue a contingency fee client on a breach of contract
8 theory that the client took an action which prevented the
9 contingency from occurring). Those two cases do not change the
10 court's view.

11 Defendants also assert that the Unfinished Business Rule
12 interferes with a client's right to hire and fire counsel. But as
13 this court held in *Heller II*, the right of a client to choose its
14 lawyers is not implicated here. *Heller II*, 2013 WL 951706, at *5.
15 The Trustee is not challenging the clients' right to choose
16 counsel; rather he is "challenging the right of defendants to keep
17 profits (measured after allowing reasonable compensation) for
18 completing [Howrey [U]nfinished [B]usiness] for which [the
19 Debtor's former partners] (including those retained by defendants)
20 would have to account absent the Jewel Waiver." *Id.*

21 D.C.'s version of the rule (RPC 1.16) permitting a client to
22 terminate a lawyer at any time simply prevents a client from being
23 "forced to continue to employ an attorney with whom he no longer
24 retains this rapport [of trust and confidence]." *King & King*, 436
25 F. Supp. 2d at 12. None of Debtor's former clients was forced to
26 continue employing the firm. The clients voluntarily selected the
27 former Debtor partners and defendants as their new counsel. This
28 change in counsel has given rise to potential liability for

1 profits on Howrey Unfinished Business but the clients' rights to
2 hire and fire counsel were not affected.

3 Defendants also contend that the Unfinished Business Rule
4 constitutes a restrictive covenant that impermissibly affects
5 lawyer mobility, citing D.C.'s RPC 5.6 prohibiting agreements
6 restricting a lawyer's right to practice. *See Neuman v. Akman*, 715
7 A.2d 127, 130-31 (D.C. 1998). RPC 5.6 is intended to

8 protect lawyers, particularly young lawyers, from
9 bargaining away their right to open their own offices
after they end an association with a firm or other legal
10 employer. It also protects future clients against
having only a restricted pool of attorneys from which to
choose.

11 *Id.* (citing 2 Geoffrey C. Hazard, Jr. & William Hodes, *THE LAW OF*
12 *LAWYERING* § 5.6:201, at 824 (2d ed. Supp. 1997)).

13 To violate RPC 5.6, a restriction on lawyer mobility must be
14 "linked to [the former lawyer's] decision to compete with the
15 firm." *Ashcraft & Gerel v. Coady*, 244 F.3d 948, 955 (D.C. Cir.
16 2001). Here, neither the Unfinished Business Rule (imposing a
17 duty to account on the law firm's former partners) nor Debtor's
18 Partnership Agreement (confirming that fiduciary duty) is a
19 restrictive covenant that violates RPC 5.6. As the District of
20 Columbia Court of Appeals found in *Beckman*, the Unfinished
21 Business Rule "does not disable the former partners in a law firm
22 from accepting employment from former clients of the dissolved
23 partnership." *Beckman*, 579 A.2d at 638. The former Debtor
24 partners are not restricted from competing with Debtor; Debtor is
25 no longer a competitor precisely because it has dissolved.
26 Unsurprisingly, courts have found lawyer mobility arguments made
27 under rules similar to RPC 5.6 "unimpress[ive]," and no prior law
28

1 firm dissolution case has concluded the Unfinished Business Rule
2 was an impermissible restrictive covenant. See *Labrum*, 227 B.R.
3 at 415 (rejecting application of MRPC 5.4 or 5.6(a) to unfinished
4 business case); *Coudert*, 480 B.R. at 169-70 (rejecting application
5 of New York Rule 5.6 to unfinished business case).

6 In the absence of D.C. cases holding that the Unfinished
7 Business Rule violates ethical and professional rules, defendants
8 cite by analogy several D.C. Ethics Opinions and an unpublished
9 decision (*Shainis v. Baraff, Koerner & Hochberg, P.C.*, No. 93-2253
10 (D.D.C. July 18, 1994)). The court is not persuaded by this
11 authority. *Shainis* held that a partnership agreement provision
12 violated RPC 5.6 when a departing partner's deferred compensation
13 was reduced because the departed partners competed for the former
14 firm's clients. *Shainis*, No. 93-2253, at *7 (D.D.C. July 18,
15 1994). Here, Debtor and the defendants are not competing for
16 clients, and the application of the duty to account is not
17 contingent upon whether the former Debtor partners did compete
18 with Debtor.

19 Similarly, the ethics opinions defendants cite are
20 inapplicable to the Unfinished Business Rule. These opinions
21 invalidated partnership agreements that: (1) imposed an "absolute
22 eighteen month prohibition on [the departing lawyer's]
23 representation" of the firm's clients at a new firm;¹⁰ (2)
24 restricted a lawyer "apparently for all time" from "actually
25
26

27 ¹⁰ See D.C. Bar Opinion No. 122 (Mar. 1983) (finding that
28 five-year requirement of remitting fees to former firm violated
fee-sharing provisions in DR 2-107(A)).

1 representing [the firm's clients] if they asked for assistance;"¹¹
2 and (c) discouraged a partner "from competing against the former
3 firm, or even representing [the former firm's] clients at all" by
4 forcing the attorney to forgo a return of capital for five years.¹²

5 Paragraph 13.9 of Debtor's Partnership Agreement does not contain
6 any language analogous to these provisions, and the Unfinished
7 Business Rule does not prevent Debtor's former partners from
8 accepting employment from the firm's former clients.

9 In contrast, a later D.C. Ethics Opinion recognized that "the
10 simple existence of an economic cost to leave a firm" does not
11 violate RPC 5.6. See D.C. Bar Op. 325 (Dec. 2004). Instead, the
12 prior law firm must actually "restrict the rights of a lawyer to
13 practice after termination of the relationship." *Id.* Therefore,
14 especially in light of the holding in *Beckman* that the Unfinished
15 Business Rule does not restrict a former partner's right to
16 practice, the court rejects Defendants' lawyer mobility argument.

17 In sum, this court concludes that under D.C. law, the
18 Unfinished Business Rule applies to contingency fee cases, hourly
19 rate cases and any variations of those well-established concepts.

20 **B. The Trustee may not recover under the fraudulent**
21 **transfer laws profits on Howrey Unfinished Business that**
22 **was handled by former partners of Debtor who left Debtor**
prior to its dissolution.

23 Defendants argue that this court's *Heller II* and other cases,
24 including *Coudert* and *Robinson v. Nussbaum*, supra, limit their
25 analysis of unfinished business to matters that were pending at

26 ¹¹ See D.C. Bar Opinion No. 181 (Apr. 21, 1987) (explaining
27 agreement also imposed a \$150,000 liquidated damages if lawyer
"interfere[d] with the business of the firm in any way").

28 ¹² See D.C. Bar Opinion No. 241 (Sept. 21, 1993).

1 the time of the dissolution of the law firm in question. In
2 *Heller* and *Brobeck*, of course, the plaintiff made no attempt to
3 recover from any law firm defendants except based upon a Jewel
4 Waiver as fraudulent transfer theory. The Jewel Waiver, quoted in
5 part above, states that neither the partners nor the Debtor "shall
6 have any claim or entitlement to clients, cases or matters ongoing
7 at the time of dissolution...." (Emphasis added.) And in *Coudert*
8 and *Robinson*, there is no fraudulent transfer analysis at all.

9 With the Trustee's claims framed as they are now the
10 definition of "unfinished business" need not be limited to matters
11 pending as of dissolution. In *Brobeck* and *Heller* there was no
12 need to define "unfinished business" otherwise. Here there is no
13 reason to limit the definition of Howrey Unfinished Business to
14 matters pending as of dissolution. In context, therefore, the
15 definition has to extend to matters that were unfinished when
16 partners of Debtor took them and joined defendants before the
17 Jewel Waiver and dissolution.

18 The problem the court has is with the Trustee's underlying
19 theory that he may recover under the fraudulent transfer laws
20 profits on pre-dissolution matters that no longer belonged to
21 Debtor on the date of the critical transfer. Stated otherwise,
22 when partners left Debtor prior to dissolution, taking Howrey
23 Unfinished Business with them, that business itself and any future
24 profits to be realized on it was no longer property of Debtor that
25 could have been subsequently disposed of by the Jewel Waiver, a
26 fraudulent transfer. *Heller II*, 2013 WL 951706 at *5; *Heller I*,
27 2011 WL 1539796 at *5; *Brobeck*, 408 B.R. at 338. As stated in
28 *Heller II*, 2013 WL 951706 at *12:

1 The Jewel Waiver transferred to Shareholders the right to
2 complete unfinished business free of any burden to account
back to Heller for profits made on that business.

3 The obvious conclusion, therefore, is without a transfer
4 there can be no fraudulent transfer.

5 The Trustee makes a strained argument that partners who left
6 Debtor prior to dissolution were still partners for purposes of
7 his theory of the case. The reasoning is that those partners who
8 left Debtor continued to be partners because of the operation of
9 Paragraph 16.6 of the Partnership Agreement. That provision
10 reaches back 180 days prior to dissolution to rescind a previously
11 departed partner's rights "for purposes of receiving benefits
12 pursuant to [the Partnership Agreement] but instead [such partner]
13 shall be deemed to be a continuing partner of this Partnership for
14 purposes of distribution pursuant to Paragraph 16.5 hereof."

15 (Emphasis added.)

16 Paragraph 16.5 deals with the liquidation of Debtor and sets
17 forth how Debtor's partners will share in the net proceeds of that
18 liquidation, after payments of debts. The relation back
19 provisions of Paragraph 16.6 are very narrow, have no
20 applicability here, and by no means can be construed to say that
21 former partners were still partners just because their net
22 distribution was to be adjusted if a liquidation occurred within
23 180 days of their departure. Certainly, no reasonable
24 interpretation of that paragraph is that pre-dissolution departing
25 partners were partners for purposes of the Unfinished Business
26 Rule.

27 Trustee argues that under D.C.RUPA § 33-106.03(b)(3), a pre-
28 dissolution departing partner must account for profits with regard

1 to matters arising and events occurring before the partner's
2 disassociation. That is the law, but that does not mean that a
3 partner who is bound by that section continued to be a partner,
4 and thus was a transferee of a later transfer that occurred as a
5 Jewel Waiver (whether fraudulent or not).

6 Trustee also relies on *Buckley Towers Condominium, Inc. v.*
7 *Katzman Garfinkel Rosenbaum, LLP*, 519 F. App'x 657 (11th Cir.
8 2013). That case and others may support an accounting claim in an
9 amended complaint, but they do not support the Trustee's
10 fraudulent transfer theory.¹³

11 The motions will be granted insofar as the complaints seek to
12 recover from defendants based on Howrey Unfinished Business they
13 acquired from former partners who left prior to the Jewel Waiver.

14 **C. The Trustee may recover under the fraudulent transfer**
15 **laws profits on Howrey Unfinished Business that was**
16 **acquired from former partners of Debtor who left as of**
or after its dissolution.

17 In *Heller I* (on motions to dismiss) and *Heller II* (on motions
18 for partial summary judgment), this court determined that Heller's
19 unfinished business was property of Heller; that Heller was
20 insolvent on the date of the Jewel Waiver; that no reasonably
21 equivalent value was given for what was transferred to the Heller
22 partners who were the beneficiaries of the Jewel Waiver and who
23 later joined defendants; that the Jewel Waiver was a fraudulent
24 transfer; that each defendant was an immediate transferee of the
25 initial transferee Heller partners who received the right to
26 complete the unfinished business without having to account for any

27 ¹³ Nor does the decision by counsel in *Heller* not to proceed
28 against law firms based upon business acquired by them prior to
dissolution and the Jewel Waiver have any relevance here.

1 profits, and thus those defendants came within the reach of 11
2 U.S.C. § 550(a)(2); and that none of the defendants took the
3 unfinished business for value, thus depriving them of the safe
4 harbor of 11 U.S.C. § 550(b)(1). *Heller I*, 2011 WL 1539796 at *4-
5 5; *Heller II*, 2013 WL 951706 at *7-15.

6 Here the matters are at the pleading stage, as no evidence
7 has been presented and neither side has sought summary or partial
8 summary judgment. Nevertheless, the court's reasoning in those
9 decisions apply with equal force to the complaints' claims for
10 constructive or actual fraudulent transfer liability of defendants
11 who were joined by one or more of Debtor's partners after the
12 Jewel Waiver (Pillsbury Winthrop Shaw Pittman LLP, Haynes & Boone
13 LLP and Jones Day LLP).

14 In *Heller III* defendants argued that as a matter of law,
15 there could be no profit on unfinished business, and thus no
16 fraudulent transfer liability because there fees and costs were
17 per se reasonable. The court summarized and rejected that
18 argument:

19 Defendants' position is, in essence, that there are
20 no net profits on the Unfinished Business which are
21 recoverable by *Heller*. With some variation in how
22 Defendants present their arguments and in how their
23 several experts structure their analyses to reach their
24 ultimate opinions, the court distills those theories
25 down into a simple "No Profits" proposition that it
26 categorically rejects. According to Defendants, the
27 Unfinished Business profits equal revenue less
28 compensation paid to shareholders/partners, less
compensation paid to non-owner employees, less operating
costs. Thus, they opine, there was no profit and thus,
nothing for *Heller* to recover.

26 *Heller II*, 2014 WL 323068 at *6.

27 As discussed in more detail later, the court
28 rejects Defendants' contention that the entirety of the
fees received by them with respect to *Heller's*

1 Unfinished Business constitutes, as a matter of law,
2 "reasonable compensation" which they are entitled to
3 retain under RUPA. It also rejects their argument that
4 the value of the Unfinished Business is minimal to non-
5 existent because Heller would not have been able to
6 complete the Unfinished Business following dissolution.

7 *Id.* at *2.

8 For the same reasons here the court rejects defendants'
9 similar arguments. Accordingly, the motions will be denied
10 insofar as they relate to claims for profits on the Howrey
11 Unfinished Business acquired from Debtor's partners who joined
12 defendants after the Jewel Waiver.

13 **D. The Trustee May Not Recover Profits on Howrey Unfinished**
14 **Business on the Accounting and Turnover count under 11**
15 **U.S.C. § 542.**

16 Trustee's Count V seeks an accounting and turnover pursuant
17 to 11 U.S.C. § 542. As stated in the discussion, *supra*, on the
18 date of the Jewel Waiver the Howrey Unfinished Business that had
19 already been taken by previously departed partners did not belong
20 to Debtor and thus there was no transfer. Trustee argues that
21 under D.C. RUPA the profits from that Howrey Unfinished Business
22 must be held in trust and therefore the Trustee may prosecute a
23 turnover action under 11 U.S.C. § 542. That argument assumes the
24 conclusion the Trustee desires. If, for example, a client of
25 Debtor had paid for services rendered by it prior to the departure
26 of the responsible partner, and that payment had been held by one
27 of defendants, turnover might be an appropriate remedy. But
28 whether or not there are any profits to be recovered cannot be
presumed to be property of the estate, at least at the stage of
the pleading.

Trustee seems to recognize this analysis in his opposition to

1 defendants' motions because he does not emphasize the section 542
2 turnover argument that is set forth in the seven short paragraphs
3 of Count V. While it may well be that Trustee can make a case
4 against defendants based upon pre-dissolution partners who joined
5 them and completed Howrey Unfinished Business that was not
6 concluded as of Debtor's dissolution, much like the theory of the
7 case in *Coudert*, supra, the current state of the pleadings is
8 insufficient. The motions will be granted as to Count V.

9 **E. The Trustee May Amend the Complaints to Seek to Recover**
10 **Profits on Howrey Unfinished Business under Theories**
11 **Other than Fraudulent Transfer Laws.**

12 No citation or extended discussion is necessary for the
13 fundamental notion that a complaint may be amended unless there is
14 no plausible theory on which the plaintiff may recover. Here the
15 court is rejecting the Trustee's fraudulent transfer theory where
16 there was no transfer, but that is not the end of the matter for
17 defendants other than Haynes & Boone LLP (to whom no Debtor
18 partners went before the Jewel Waiver). Those defendants were
19 joined by former Debtor partners prior to the Jewel Waiver and the
20 Trustee should not be denied an opportunity to pursue them for
21 profits on Howrey Unfinished Business on an accounting theory.
22 This is the approach taken by the plaintiff in *Coudert*, 480 B.R.
23 at 160-61. In *Heller III* this court observed:

24 While *Heller* is not pursuing Defendants under a direct
25 accounting theory, it is pursuing them as subsequent
26 transferees of the avoidable transfers. Consequently,
27 the court must focus on the non-bankruptcy law rights
28 that were surrendered by *Heller* when the Jewel Waiver
was executed, viz., the right to recover profits under
RUPA and California state law. Liability under the
fraudulent transfer law here or under well-established
partnership principles as considered in *Coudert*, are
two sides of the same coin.

1 *Heller III*, 2014 WL 323068 at *3.

2 The court agrees with the Trustee that a duty to account
3 extends to partners who left Debtor before the Jewel Waiver. That
4 duty is found in DC RUPA § 33-106.03(b)(3) and applies "only with
5 regard to matters arising and events occurring before the
6 partner's dissociation..." (Emphasis added.)¹⁴ It does not apply
7 to new business originated even from a preexisting client, but
8 does apply to Howrey Unfinished Business - matters arising - that
9 was completed by one of the defendants.

10 *Buckley Towers* is in accord:

11 Moreover, RUPA still supports the premise that
12 partners are not entitled to additional remuneration
13 during a partner's dissociation. In fact, the example
14 provided in the uniform commentary clearly supports the
15 continuation of the *Frates* rule by stating that
dissociated partners must account to the partnership for
any fees from ongoing client transactions that are
received after dissociation.

16 *Buckley Towers Condominium, Inc. v. Katzman Garfinkel Rosenbaum,*
17 *LLP*, 519 Fed. App'x. 657, 662 (11th Cir. 2013). .

18 The court acknowledges that in *Heller II* "unfinished
19 business" was described as that which existed at the time of
20 dissolution. *Heller II*, 2013 WL 951706 at *4. As noted
21 previously, the plaintiff there did not seek to recover profits on
22 business that left the firm prior to dissolution under any theory.
23 For purposes of the Trustee's theory here, the definition of
24 Howrey Unfinished Business is not limited to that which existed on

25

26 ¹⁴ The court expressly rejects one of defendants' argument
27 that an Author's Comment regarding this D.C. RUPA provision
28 prevails over the plain words of the statute and the Official
Comment to it, and there is merely a duty to account for fees
earned prior to dissociation.

1 the date of the Jewel Waiver or dissolution.

2 The Trustee will be given leave to amend the complaints to
3 state claims against Defendants other than under the fraudulent
4 transfer theories.

5 V. CONCLUSION

6 Counsel for the Trustee should prepare and circulate among
7 defendants forms of orders granting and denying the various
8 motions, consistent with this Memorandum Decision as applied to
9 the circumstances of each defendant. Those orders should permit
10 leave to amend the complaint to seek an accounting (not a
11 fraudulent transfer recovery) based upon Howrey Unfinished
12 Business that went with partners who left Debtor prior to
13 dissolution. The amended complaints should be filed and served no
14 later than thirty days following entry of the specific orders
15 granting the particular defendant's motion.

16 The court will hold a continued status conference in these
17 six adversary proceedings on March 25, 2014, at 9:30 a.m.

18 **END OF MEMORANDUM DECISION**

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